Local Government (Councillor Conduct) and Other Legislation Amendment Bill 2023

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Office of the **Independent Assessor**

3 October 2023

Mr Christopher Whiting MP, Member for Bancroft
Chair
State Development and Regional Industries Committee
Parliament House
George Street
Brisbane QLD 4000

Via email: SDRIC@parliament.qld.gov.au

Dear Mr Whiting

Re: OIA submission on the *Local Government (Councillor Conduct) and Other Legislation Amendment Bill 2023*

The attached submission on the *Local Government (Councillor Conduct) and Other Legislation Amendment Bill 2023* is provided to assist the Committee and government to achieve key efficiencies within the councillor conduct complaints system, but also to ensure that there is an appropriate balance between the interests of councillors and the interests of Queensland communities in having civic leaders who are bound by, and comply with, reasonable conduct and integrity standards.

This submission focuses on seven key issues arising from consideration of the Bill, including:

1. conduct which is 'solely behaviour engaged in by a councillor in a personal capacity'
2. the application of the framework to former councillors
3. new time limitations on dealing with councillor conduct
4. new vexatious declaration provisions
5. the definition of misconduct
6. new legislated assessment process; and
7. the application of the transitional provisions and omission of the corrupt conduct exception.

To demonstrate the points made, this submission contains confidential case studies which are clearly marked for the benefit of the Committee. This information is provided to you consistent with section 150EA of the *Local Government Act 2009* as submissions on Bills, including relevant case studies, relating to changes to the councillor conduct provisions are reasonably incidental to the performance of the functions of the Independent Assessor; having regard also to the role of the Committee in oversighting the Office of the Independent Assessor, the councillor complaints framework and considering relevant legislation.

The information in each of the boxed case studies should be redacted in full before the submission is published.

Queensland Government

The OIA thanks the Committee and all stakeholders for the amendments in the legislation that reflect suggestions made by the OIA during the councillor conduct complaints system inquiry.

I would be pleased to discuss the submission at any further public hearing conducted in relation to the Bill.

Thank you for your continued interest and attention to the councillor conduct complaints system.

Sincerely

[redacted]

Kathleen Florian
Independent Assessor

Queensland Government

Office of the Independent Assessor -

Submission on the *Local Government (Councillor Conduct) and Other Legislation Amendment Bill 2023*

and transitional provisions

State Development and Regional Industries Committee

3 October 2023

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Introduction

This submission on the *Local Government (Councillor Conduct) and Other Legislation Amendment Bill 2023* is provided to assist the Committee and government to achieve key efficiencies within the councillor conduct complaints system, but also to ensure that there is an appropriate balance between the interests of councillors and the interests of Queensland communities in having civic leaders who are bound by, and comply with, reasonable conduct and integrity standards.

Against a background of a significant volume of complaints received since the councillor conduct complaints system began in 2018, and delays in the Councillor Conduct Tribunal (CCT) being able to deal with misconduct applications, the Bill's practical effect is to reduce the circumstances in which complaints about current and former councillors can be assessed, investigated and dealt with.

This submission addresses seven issues arising from the Office of the Independent Assessor's (OIA) unique operational knowledge of the system, including:

1. conduct which is 'solely behaviour engaged in by a councillor in a personal capacity'
2. the application of the framework to former councillors
3. time limitations on dealing with councillor misconduct
4. new vexatious declaration provisions
5. the definition of misconduct
6. new legislated assessment process; and
7. the application of the transitional provisions and omission of the corrupt conduct exception.

Already, 95 per cent of all complaints and notifications received by the OIA **do not** result in a referral to the CCT.

This has been driven by considerations including public interest considerations and the need to balance complaint volumes with the available resources to deal with them.

While the OIA fully appreciates the challenges and pressures on the councillor conduct system, the Bill in its present form raises concerns about how new mandatory requirements to dismiss certain conduct of a councillor at the preliminary assessment stage, may prejudice the ability of the OIA, the Crime and Corruption Commission (CCC) and or the CCT to:

- identify and deal with conduct that is, or may be, suspected corrupt conduct, and
- identify and deal with misconduct which is properly within the new Bill.

This is particularly the case in relation to the new mandatory requirement to dismiss, on preliminary assessment, all alleged misconduct of a councillor which is more than one year old, or two years in limited circumstances.

Based on the OIA's experience in undertaking preliminary assessments of complaints and notifications and dealing with vexatious complainants, this submission also highlights potential unintended consequences of the proposed new assessment and vexatious declaration processes, which have the ability to divert OIA resources from its key role - the investigation and prosecution of councillor misconduct.

The Bill does address issues raised by the OIA and recognises existing OIA processes implemented to make the councillor conduct scheme more efficient and effective including:

- removing the mandatory requirement that the OIA must investigate all complaints and notifications
- recognising the OIA's existing preliminary assessment process
- requiring councillors and local governments to provide further information required to undertake a preliminary assessment of a notification within 10 business days
- that dismissed matters are no longer required to be published in councillor conduct registers; and outcome advices are no longer required to be provided to local governments on all dismissed matters
- removing the need for the OIA to undertake a preliminary and duplicate natural justice process, when referring conduct breach complaints to local governments to deal with
- removal of a breach of acceptable request guidelines as misconduct
- addressing the deficiency in existing conflict of interest legislation in relation to declarable conflicts of interest
- providing the OIA with the ability to withdraw matters from the CCT in appropriate circumstances including where there is a change of circumstance impacting on the public interest with proceeding with a matter
- publication of CCT decisions in full
- that the Committee continue oversight of the OIA and be required to provide regular strategic review of the councillor conduct framework and
- adoption of some exceptions to the new limitations on the receipt of and dealing with councillor conduct complaints.

The OIA also welcomes:

- improvements to the transparency around councils dealing with conduct breaches (inappropriate conduct) that requires reporting by both councils and the OIA
- further efficiencies in CCT processes, and critically,
- the introduction of new mandatory training for councillors.

The OIA thanks the Committee and all stakeholders for the amendments in the legislation that reflect suggestions made by the OIA during the councillor conduct complaints system inquiry.

The following amendments to the Bill are offered in the same spirit, to improve the councillor conduct complaints system for the benefit of all stakeholders, including the Queensland communities who councillors serve.

1. Personal conduct

Current position on personal conduct

The OIA currently deals with personal conduct of a councillor as misconduct if there is a connection between the conduct and a councillor's role or responsibilities.

The responsibilities of a councillor are set out in section 12 of the *Local Government Act 2009* (LG Act) and the local government principles, which apply when a councillor is performing a responsibility, are set out in section 4 of the LG Act.

One of the responsibilities of a councillor and or Mayor is to provide high quality leadership to the local government and to the community. Section 12 (3)(b)

In assessing whether a complaint or notification relating to personal conduct raises or may raise potential misconduct the OIA has regard to the following considerations;

- has the conduct impacted in a measurable way on the reputation of the council or the standing of the councillor
- did the councillor identify themselves as a councillor when undertaking the conduct, or were they identifiable as a councillor
- did the councillor invoke their position or authority as a councillor, and
- did the conduct involve the use of, and/or damage to, council assets.

The CCT has consistently taken a strong position on what is and what is not 'personal conduct'. In its decision on Cr James Hansen, Fraser Coast Regional Council, the CCT stated for example,

'The Respondent's position that his private Facebook account has 'absolutely nothing to do with my position as councillor' cannot be accepted. As this Tribunal has pointed out in cases such as Glasgow, Gleeson and Stewart, what a councillor says and does in their 'down time' can (and frequently does) reflect upon their appointment and the council more generally.'

What the Bill says

The Bill removes conduct which is 'solely behaviour engaged in by the councillor in a personal capacity…' from the councillor conduct framework.

- **150SD Preliminary assessment of complaints, notices or information**
  (2) (c)(ii) Assessor must dismiss or take no further action on complaints, notifications or information that relates solely to behaviour engaged in by the councillor in a personal capacity unless the conduct is suspected corrupt conduct

Transitional provisions

- **350 Particular conduct tribunal applications taken to be withdrawn**
  (1)(c)(iii) Requires applications that have previously been referred to the Councillor Conduct Tribunal which relate solely to behaviour engaged in by the councillor in a personal capacity be withdrawn, unless the conduct is suspected corrupt conduct

- **347 Existing investigations by a local government**
  (5) (b) Requires existing investigations where the conduct relates solely to behaviour engaged in by the councillor in a personal capacity, be dismissed or subject to no further action.

Section 150L (What is misconduct) replaces in section (1)(b)(i) a 'breach of trust' engaged in by a councillor with '*non-compliance with an Act by the councillor'.*

The Bill does not define 'personal conduct'

Explanatory Notes

The Explanatory Notes for the Bill relevantly state:

'*Private conduct of councillors* – as indicated above, the IA must dismiss a complaint or decide to take no further action for a notice or information if satisfied the conduct relates solely to behaviour engaged in by a councillor in a personal capacity (unless the conduct is suspected corrupt conduct).

This new requirement clarifies that the purpose of the councillor conduct complaints system is to ensure that local government elected officials behave in an appropriate manner befitting their office and that the private behaviour of councillors (as elected representatives) is more appropriately a matter for electors to determine at the ballot box.'

Introductory speech

'The same obligation to dismiss a complaint applies if the conduct relates solely to behaviour engaged in by the councillor in a personal capacity unless the conduct is suspected corrupt conduct or misconduct.

'Our intention is that councillors should be free to have the same rights as other members of the community in their personal lives, not have particular matters be the subject of complaints about their conduct as a councillor.

'In relation to the conduct of councillors running again for office, I acknowledge the concerns of the Local Government Association of Queensland that there should be a level playing field for all election candidates, whether sitting councillors or new candidates, during election campaigns.

'The government's view is that the conduct of a councillor wholly in their capacity as a candidate is personal conduct. This determination means complaints will be dismissed at the assessment stage, as I have just outlined…. the government considers that the view of the electorate as expressed at the ballot box should be a sufficient deterrent for unacceptable conduct by all candidates.'

[underlining added]

The Bill has not amended the responsibilities of a councillor and in particular:

Section 12 (3)(b) of the *Local Government Act 2009* (LG Act) it is the responsibility of councillors and mayors to provide high quality leadership to local government and the community remains unchanged.

Issue 1: No guidance on what is solely personal conduct

There is no clear guidance on what conduct of a councillor 'solely in a personal capacity' means.

Issue 2: Whether there is a connection between particular conduct and a councillor's role or responsibility may not be able to be determined at the assessment stage

Connections between particular conduct of a councillor and the councillor's role and or responsibilities may only be identified during an investigation of a matter.

Under the proposed bill such matters must be dismissed before investigation.

Investigation powers in Chapter 5A Part 4 will not be available on assessment.

Having regard to the transitional provisions this potentially impacts the following matters that are currently before the CCT for decision and or are currently the subject of investigation.

These examples demonstrate the application of the criteria presently used by the OIA and also particularise what information was available on assessment, and what information arose as a result of an investigation into the matter.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Other disciplinary schemes

Other disciplinary schemes deal with personal conduct in particular circumstances; what those circumstances are is dependent on the nature of the role and how it may be impacted by the private conduct.

Sometimes private conduct may also result in criminal convictions.

Criminal convictions may also be dealt with under a disciplinary scheme as criminal and disciplinary proceedings have different purposes. The purpose of criminal proceedings is to enforce the criminal law, while the purpose of disciplinary proceedings is to enforce the standards of conduct required of particular roles.

Example 1: The Queensland Public Sector Code of Conduct may apply to 'personal conduct'

The Code of Conduct for the Queensland Public Service '*applies at all times when we are performing official duties including when we are representing the Queensland Government at conferences, training events, on business trips and attending work related social events*.'

Standard of conduct 1.5 Demonstrate a high standard of workplace behaviour and personal conduct
We have a responsibility to always conduct and present ourselves in a professional manner, and demonstrate respect for all persons, whether fellow employees, clients or members of the public. We will:

> *(d) ensure our private conduct maintains the integrity of the public service and our ability to perform our duties.*

Example 2: Queensland Police Service disciplinary action based on 'personal conduct'

Sworn police, like all other public servants, are required to uphold the Code of Conduct for the Queensland Public Service.

Matters involving the off-duty conduct of police officers, including criminal conduct are also dealt with on a disciplinary basis if the personal conduct undermines the integrity of the public service and the ability of an officer to perform their role as a police officer.

Examples of QPS disciplinary decisions that have been reviewed and upheld by QCAT are:

- *Austin v Deputy Commissioner Peter Martin [2018] QCAT*. Police officer criminally charged whilst off-duty
- *Crime and Corruption Commission v Carless & Anor [2019] QCAT*. Police officer harassing patrons at a licensed premises whilst off-duty
- *Hannam v Acting Assistant Commissioner Guteridge [2018] QCAT*. Police officer charged with low-level drink driving offence whilst off-duty
- *ODM (not identified applicant) v Deputy Commissioner Gollschewski [2019] QCAT*. Police officer charged with indecent dealing with minors whilst off-duty.

Example 3: Registered and unregistered health practitioners

Personal conduct, including criminal convictions arising from personal conduct, may be dealt with on a disciplinary basis as 'professional misconduct' or 'unprofessional conduct' or may result in immediate action to cancel a health practitioner's registration or impose conditions on their

practice[1].

Professional misconduct - is defined to include 'conduct of the practitioner, **whether occurring in connection with the practice of the health practitioner's profession or not**, that is inconsistent with the practitioner being a fit and proper person to hold registration'[2].

Unprofessional conduct - is defined in section 5 of the Health Practitioner Regulation National Law Qld as including '**the conviction of the practitioner for an offence under another Act**, the nature of which may affect the practitioner's suitability to continue to practice the profession'[3].

The Health Ombudsman may also take immediate registration action (i.e., suspension or imposition of conditions on a practitioner's registration) in relation to personal conduct if 'the health ombudsman reasonably believes the action is otherwise in the public interest. *Example of when action may be taken in the public interest* – A registered health practitioner is charged with a serious criminal offence, **unrelated to the practitioner's practice**, for which immediate registration action is required to be taken to maintain public confidence in the provision of services by health practitioners'[4].

Similar avenues are also available for unregistered health practitioners.

Example 4: Other councillor conduct frameworks

The matter of *Chapman v Greater Bendigo CC (Review and Regulation) [2017] VCAT 417* was a proceeding before the Victorian Civil and Administrative Tribunal (VCAT), which was reviewing a decision of the Victorian Councillor Conduct Panel.

The matter involved a councillor exchanging tweets on her personal profile with a resident in relation to the proposed construction of a Mosque in the area. As part of that exchange, the councillor shared an image of five infants with mutilated genitalia, writing "Oh we could have this here too? Would you like your fanny sliced off?" and in a further tweet writing "Yes I am opposed to female genital mutilation, child brides, inequality, women beating, all part of Quran read it".

The councillor had submitted that the tweets were her own private personal opinions and that the code of conduct did not apply to everything done in a private capacity.

However, VCAT, taking a similar position to the Qld Councillor Conduct Tribunal, said that *"… when a Councillor uses social media as Chapman did, particularly such a ubiquitous and open media as twitter, that the distinction between what was said in a private capacity and what was said in a public capacity is very difficult to make*."

VCAT went on to discuss the legislative requirement of councillors to provide leadership, to treat all persons with respect, and to have due regard to the opinions and beliefs of others. VCAT concluded that the councillor's tweets involved a violation of these principles and that the conduct was misconduct.

Example 5: Queensland Ministerial Code of Conduct

The Ministerial Code of Conduct applies ethical standards to Ministers and Assistant Ministers. It combines the ethical standards that apply to them both as Members of Parliament and as

[1] Health Practitioner Regulation National Law Qld and the Health Ombudsman Act 2013
[2] section 5 of the Health Practitioner Regulation National Law Qld
[3] Ibid
[4] Section 58(1)(d) of the *Health Ombudsman Act 2013*

Members of the Executive Government.

Ministers and Members of Parliament have obligations that flow from six fundamental principles set out in the Code of Ethical Standards of the Legislative Assembly of Queensland and include:

Integrity of the Parliament

The public's confidence in the institution of Parliament is essential. Members are to strive at all times to conduct themselves in a manner which will tend to maintain and strengthen the public's trust and confidence in the integrity of Parliament and avoid any action which may diminish its standing, authority or dignity.

An allegation that a Minister has breached the Ministerial Code of Conduct is referred to the Premier who, having regard to the nature and seriousness of the breach, has the discretion to ask the Minister to stand down.

Other Members of Parliament are to observe the Code of Ethical Standards but, for MP's it states the principles are '*…aspirational in nature and are not enforceable obligations on Members. The principles are intended to encourage Members to aspire to the highest ethical standards*.'

In practice however both Ministers and MP's who have held roles on parliamentary committees have either been required by successive Premiers to stand down or have voluntarily done so.

This has included where they have engaged in private conduct or alleged criminal conduct (i.e., not convictions).

While not a disciplinary decision of an independent tribunal, these examples demonstrate the imposition of harsher sanctions on State Ministers and some MP's, such as requiring a Minister to stand down or an MP to stand down from a parliamentary committee, which has significant financial implications.

Example 6: State Members of Parliament

- 2017 - A member of parliament was required by the Premier to stand aside as a member of the Legal Affairs and Community Safety parliamentary committee, pending the outcome of a police investigation into alleged historical forgery and harassment allegations.
- 2013 - A member of parliament and Chair of the Parliamentary Ethics Committee was required by the Premier to stand down following allegations that he had taken sexually explicit pictures of himself and sent them to a female associate who was also alleged to have travelled with the MP when he was away from his electorate.
- 2013 - A member of parliament resigned after both major parties indicated that they would support an expulsion motion. At the time it was publicly known that the MP was being investigated for allegations of soliciting secret commissions and falsifying minutes as the President of an Industry Association between 2011-13. He had also been found guilty of 42 counts of contempt of parliament for not reporting certain financial interests arising from his industry association role and misleading the house in relation to the same matter.
- 2012 -The Minister for Police resigned two weeks after being sworn in when it became known that he was being investigated for unlicensed driving. Due to an unpaid speeding fine his driver's licence had been suspended for 3 months.
- 2004 -The Minister for Tourism, Racing and Fair Trading was required by the Premier to resign after the Minister had allowed her son to drive her ministerial car to watch sporting events in Sydney.

Example 7: Federal Ministers

Federal Ministers have also been required to stand down or have voluntarily resigned as a consequence of personal conduct. Examples include:

- 2022 - Minister for Education and Youth stood aside as a Minister following a review into whether he had breached ministerial standards during an affair with a former staff member that was alleged to be abusive.
- 2021 - Minister for Industry Science and Technology resigned after being unable to provide the Prime Minster with information on who donated to an alleged blind trust established to help pay for legal expenses arising from a personal defamation action.
- 2018 - Assistant to the Deputy Prime Minister resigned after allegations about personal conduct engaged in while overseas had been referred to the AFP.
- 2018 - Deputy Prime Minister and Minister for Infrastructure resigned following allegations of sexual harassment, and affair with a staff member and an investigation into his travel expenses.

OIA position

Councillors are civic leaders and should be held to high standards of conduct.

This should include taking disciplinary action, in appropriate circumstances, where a councillor's personal conduct, or criminal convictions arising out of personal conduct, is conduct that is not befitting of a councillor and or does not provide high quality leadership to the councillor's community.

Queensland councillors should not be held to a lesser standard than that imposed on Queensland public servants, other disciplines, and councillors in other Australian jurisdictions.

While the mechanism for dealing with personal conduct of State Ministers or MP's is different. In practice Ministers who stand down or are stood down for personal conduct (or MP's who are members of parliamentary committees) receive a greater sanction than any disciplinary process before the CCT is likely to result in.

OIA recommendation

Include clearer guidance in the Bill on what is and what is not personal conduct.

Allow the OIA to investigate, in appropriate circumstances, to determine whether the conduct is personal conduct, or not.

If it is not considered that local government Mayors and councillors should be required to provide high level leadership to council employees or to their communities; then this should be removed or amended in the Responsibilities of a Councillor in section 12 of the LG Act.

2. Application of the councillor conduct framework to former councillors

The OIA supports the proposition that inappropriate conduct/conduct matters should not continue to be dealt with once a councillor vacates office.

The OIA also generally supports the proposition that misconduct investigations and or matters before the CCT should not proceed in relation to former councillors;

unless

- the conduct the subject of a complaint, notification or information involves suspected corrupt conduct; or
- provisions are put in place to adequately address where a councillor vacates office and is subsequently re-elected to office.

The importance of the suspected corrupt conduct exception

The OIA submits that without this exception, matters assessed by the CCC as suspected corrupt conduct and referred to the OIA to deal with, including after a CCC investigation, will be required to be dismissed without investigation, and or be withdrawn from before the CCT.

It is submitted that there is a strong public interest in matters assessed as suspected corrupt conduct being dealt with by the OIA on referral from the CCC, even after a councillor vacates office.

Further, when matters are referred from the CCC to the OIA for investigation and to deal with, the matters may remain subject to CCC oversight under the *Crime and Corruption Act 2001*.

Issue 1: How the corrupt conduct exception is framed

At present the exception applies to 'suspected corrupt conduct' and not the relevant complaint, notice of information.

Complaints notices or information about matters involving suspected corrupt conduct are often factually and legally complex.

Being required to limit an investigation to only particular conduct within a complaint, notice of information will be very difficult to define or determine before an investigation is undertaken into the matter.

Limiting an investigation in this way, based on the limited information available on assessment, will be prejudicial to how matters involving suspected corrupt conduct are investigated and dealt with.

To demonstrate this issue the following case study is provided.

[redacted]

[redacted]

OIA recommendation

The OIA submits that the suspected corrupt conduct exception should apply, wherever it appears in the Bill, to 'a complaint, notice or information which:

-has been assessed by the CCC as involving suspected corrupt conduct, or

-may be required to be referred to the CCC as suspected corrupt conduct in accordance with section 38 or section 40 of the *Crime and Corruption Act 2001'*.

Issue 2: Loophole for councillors to 'shed' complaints

What the Bill says

The Bill creates a potential loophole for councillors with current disciplinary matters (investigations or applications before the CCT) who vacate the office of councillor, and then re-nominate at the next election, to effectively shed unresolved disciplinary matters.

In an attempt to close this potential loophole, section 150M provides that if a councillor vacates their office and then within 12 months they are re-elected or appointed as a councillor, then the IA can re-initiate unresolved disciplinary matters that may have been withdrawn or dismissed when the councillor vacated office.

In the OIA's submission however, the 12 month timeframe is insufficient and this timeframe should be increased. It is not unusual for councillors to vacate office for a number of reasons including resignation, dismissal or failure at an election, only to return to office at a by-election or next election.

In particular where a decision is made by a local government minister to dismiss councillors; there is nothing to prevent the dismissed councillors from running for office again at the next local government election and being re-elected.

In this circumstance also a councillor would be able to shed unresolved disciplinary matters if they were dismissed 12 months or more before the next election.

The following two case studies demonstrate these gaps.

[redacted]

[redacted]

OIA Recommendation

Section 150M(1)(c) - Increase the timeframe for progressing matters against a councillor if they return to office. In the OIA's submission the timeframe should be at least 2 years

3. Time limitations on being able to assess, investigate or refer the conduct of a councillor to the CCT

What the Bill says

150SB Period for making complaint or giving notice or information

A complaint, notice or information about the conduct of a councillor **must** be made or given to the assessor—

(a) within 1 year after the conduct occurred; or

(b) within 6 months after the conduct comes to the knowledge of the person who made the complaint or gave the information or notice, but within 2 years after the conduct occurred.

150SD Preliminary assessment of complaints, notices or information

(2) On the completion of the preliminary assessment, the assessor **must** dismiss the complaint or decide to take no further action for the notice or information if the assessor is satisfied that—

(b) the complaint, notice or information was not made or given within the period required under section 150SB, unless—

(i) the conduct the subject of the complaint, notice or information is suspected corrupt conduct; or
(ii) the complaint, notice or information was not given within the period because of exceptional circumstances

(Emphasis added)

The OIA supports a six month timeframe for the receipt of complaints, notices or information about lower level inappropriate conduct/conduct breach complaints.

How the OIA has dealt with complaints received about historical misconduct or assessed corrupt conduct by a councillor.

When the OIA commenced in December 2018 it was inundated with complaints about the conduct of councillors, including complaints about historical conduct of sitting councillors – with each year that the new councillor conduct framework has been in place, complaints about the historical conduct of sitting councillors have significantly reduced.

Upon careful consideration of the implications of the proposed amendments in the Bill, reservations are held on the proposed time limitations on delating with misconduct of a councillor.

Issue 1: Timeframe for dealing with misconduct of a councillor should be expanded

The OIA submits that there should be no timeframe on dealing with misconduct of a current councillor who has been elected to serve their constituents and who has taken an oath of office to comply with the local government principles and the LG Act; noting that the purpose of the LG Act is 'to provide a system of local government in Queensland that is accountable, effective, efficient and sustainable' at section 3(b).

Further, it is submitted that the application of strict and restrictive timeframes for dealing with the misconduct of current councillors will or may result in artificial and arbitrary outcomes which will be prejudicial to identifying and dealing with misconduct of a sitting councillor. For example:

a) The provisions have been drafted as if a complaint notice or information will only ever relate to one allegation of misconduct. Complaints or investigations however frequently involve multiple allegations. They may involve an alleged course of conduct or a continuing breach of conduct standards (such has an ongoing failure to disclose particular interests in a register of interest over time.) Some conduct may fall within the 12 month timeframe and some conduct may fall outside the timeframe. Continuing conduct may traverse both. Is the OIA to separate out particular conduct and partially dismiss other related allegations in the same complaint, notice or information?

b) This will mandate the dismissal of misconduct by a current councillor, including within the same term of government, in circumstances where a proper investigation may reveal conduct that was within the timeframe

If it is for constituents to use their vote to deal with councillors who do not comply with councillor conduct standards, how are constituents to know of the departures from these standards or the extent of these departures. Or how are they to have confidence in whether it can be fairly said that a councillor has engaged in misconduct or not.

An effective councillor conduct scheme both brings misconduct into the open or, equally importantly, clears a councillor of allegations after proper process, whether that be by the OIA after investigation, the CCT or QCAT on review.

It is noted that the second part of section 150SB would extend the timeframe to two years where

the complaint is made within six months after the conduct comes to the knowledge of the person who made the complaint or gave the information or notice. However, when a complainant may have become aware of conduct is often not susceptible to proof and or may be contested by a councillor, which contest would go to the jurisdiction of the OIA to investigate the matter and the Tribunal's ability to determine it.

OIA recommendation

There should be no timeframe on dealing with the misconduct of a sitting councillor; and if timeframes are to be applied, they should at least allow misconduct of an elected representative undertaken in the same term of government, to be dealt with.

If the proposed restrictions on dealing with misconduct of a councillor remain, then the provisions should be amended to:

a) address how complaints, notices or information which involve allegations or evidence that is both within the timeframe and outside it – are to be dealt with in the public interest
b) provide the OIA with access to investigation powers on assessment in order to determine whether there is, or is not, conduct that should be further dealt with.

Issue 2: Corruption exception is redundant, if complaints or notifications not made due to time limits

Section 150SB in effect provides that out of time complaints notice or information about the conduct of a councillor should not be provided to the assessor.

This means that upon assessment of complaints the exceptions in section 150SD of suspected corrupt conduct and exceptional circumstances, will not be applied, because the complaints notices or information will not come.

Further, section 150SB should make it clear that it does not limit the obligation of certain public officials, or the ability of others, to report suspected corrupt conduct of a councillor to the CCC; and it does not operate to prevent the CCC referring suspected corrupt conduct to the OIA to deal with in accordance with devolution principles and the *Crime and Corruption Act 2001*.

It is submitted that there is a strong public interest in matters assessed as suspected corrupt conduct on the part of sitting councillors be dealt with by the OIA on referral from the CCC, even if the conduct occurred more than 12 months before.

OIA recommendation

If restrictions on dealing with misconduct of current councillors are to remain then the proposed section 150SB should be amended to make it clear that:

-out of time suspected corrupt conduct can or must still be reported to the CCC
-that section 150SB does not operate to prevent the CCC from referring out of time suspected corrupt conduct to the OIA to deal with in accordance with the devolution principles and the *Crime and Corruption Act 2001,* and
-that complainants and notifiers may still notify the assessor of out of time matters where exceptional circumstances exist for the matter not being reported earlier.

Issue 3: How the corrupt conduct exception is framed

As previously raised, there is a significant issue in how the 'corrupt conduct' exception is referred to in multiple locations throughout the Bill. This issue has already been dealt with in this submission. *Refer to Page 16.*

Issue 4: Where a local government official has not notified the assessor in time

There are occasions where the reason a complaint notification or information about the conduct of a councillor has not been received within a one year period is because a local government official or officials have not complied with their obligation under section 150R to notify the assessor of the conduct, when they first became aware of it.

There is a mandatory obligation on local government officials to in section 150R to give the assessor notice when they become aware of information 'indicating a councillor may have engaged in conduct that would be inappropriate conduct or misconduct'.

It is respectfully submitted that it would be inappropriate, and open to potential abuse, for non-compliance with mandatory reporting obligations to result in the OIA being required to dismiss allegations of misconduct against a sitting councillor.

OIA recommendation

It is recommended that potential misconduct of a sitting councillor should not be required to be dismissed in circumstances where a local government official has not complied with their statutory obligation to report it and that this circumstance should be an express exception in section 150SB and 150SD.

[redacted]

Support for exceptional circumstances in assessing a complaint

Occasionally there will be other exceptional circumstances that lead to a delay in making a complaint or notification.

[redacted]

4. Vexatious declaration

The Bill does not provide for changes to the existing vexatious complaint offence recommended by the Solomon Review, other stakeholders and SDRIC's report recommendation, but introduces a new and complex vexatious declaration process which is modelled on the Section 127 Vexatious applicants in the *Information Privacy Act 2009*.

What the Bill says

Vexatious complainants 150AWA, 150AWB, 150AWC, 150COA, 150CP, 150CR and 150CS

The vexatious declarant flowchart below maps the process contained in proposed sections:

- 150AWA, 150AWB, 150AWC, 150COA, 150CP, 150CR and 150CS.

If a person repeatedly makes councillor conduct complaints, and after at least three complaints are dismissed as vexatious, the assessor may send correspondence to a person giving them a reasonable opportunity respond to why they should not be declared vexatious.

The assessor must consider the response before deciding whether a declaration should be made and in what terms. If a declaration is made the assessor must serve notice on the person and may publicly identify them.

The person may seek an internal review of this decision within 30 days or may also make application to the assessor to:

a) revoke or alter the declaration, or
b) seek permission to make a further complaint.

There appears to be no limit on how many applications a complainant may make to revoke or alter a declaration, or to seek permission to lodge a complaint, and a decision made by the assessor in relation to both of these matters is also subject to internal reviews.

A request for internal review of all of the decisions outlined above must be made within 30 days.

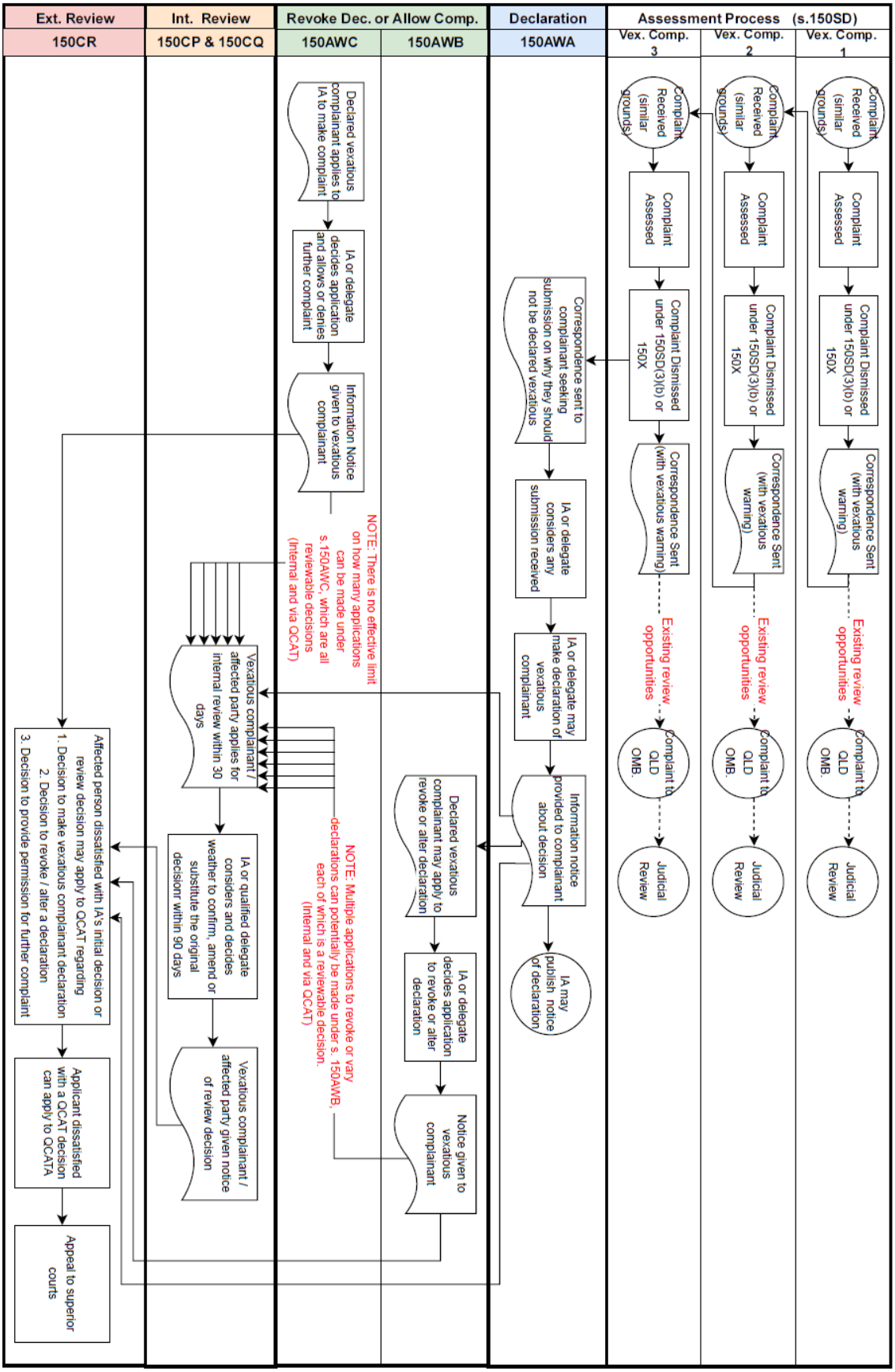
Within 90 days of an application for internal review on any of the above decisions, the IA must make a review decision and give the complainant a QCAT information notice.

In respect of any of these internal review decisions a complainant may then apply to QCAT within 28 days to review, the IA's review, of any of the above decisions.

Should a complainant be dissatisfied with a QCAT decision on review it would be open to them to appeal the QCAT review, of the IA internal review, to a judicial review, and so on.

The following flow chart depicts the vexatious declaration process.

Vexatious declaration flowchart



Issue 1: Unnecessarily complex and resource intensive process

This process has the capacity to redirect OIA resources from core functions.

Multiple QCAT review points will also further burden an already over-loaded QCAT, where reviews on misconduct findings are currently taking more than three years to determine.

It appears this section has been modelled on the *Section 127 Vexatious applicants* of the *Information Privacy Act 2009* for the Office of the Information Commissioner (OIC) but there are differences in that there is one external review points to QCAT in the OIC process and three points which can be the subject of a QCAT review in the proposed Bill.

Enquiries undertaken with the OIC in relation to the use or utility of these provisions have indicated that since 2009:

- the OIC has received five requests from other state government entities to declare an individual as vexatious. These are relatively straight forward matters for the OIC to deal with, as the requesting entity does most of the work.
- the OIC has issued only one declaration on their own behalf. This was very resource intensive process, with four staff working on it, and resulted in a complainant being banned from making a complaint for two years.
- Declarations are treated by the OIA as a last resort, due to the resources required to process them. The preference is to manage complainants.

When the OIC made their only own initiated vexatious declaration in 2021, their annual report stated:

> '*Such declarations are made in exceptional circumstances and where significant steps have been taken to attempt to manage the conduct'*, and the '*OIC is also conscious of the importance of equitable and timely access for other applicants, which is compromised by managing such conduct at agency and external review*.'

Issue 2: The vexatious declaration process applies only to members of the public

While it must be borne in mind that that local government officials have an obligation to notify councillor conduct under section 150R and the majority do so in good faith, it is not complainant behaviours of members of the public that are of primary concern.

It is the OIA's experience that it is councillors, not members of the public, who are motivated to use the complaints system improperly and are redirecting OIA resources away from dealing with substantive conduct matters. The Committee heard and saw evidence of this during the inquiry.

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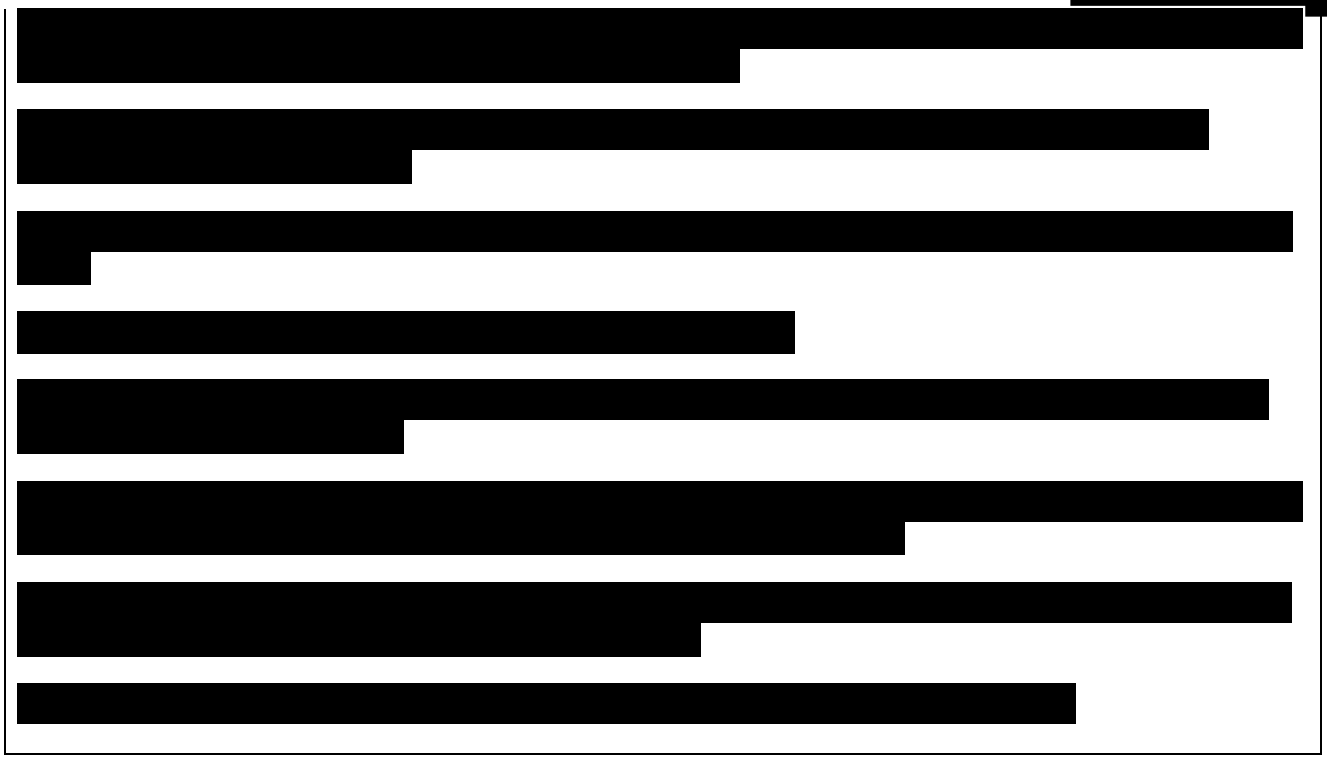
[redacted]



Issue 3: Vexatious declaration will not address improper complaints by candidates in 2024 elections

There are a sub-group of persons within members of the public who are motivated to misuse the councillor complaints framework.

This sub-group are comprised of former councillors and candidates who are politically motivated to target existing councillors. This group are considerably less active during the course of a local government term, but complaints escalate during the campaign period. Often the complaints do not come from the candidates themselves, but from their partners, and sometimes other close associates.

The complexity of the vexatious declarant process would not be time responsive to dealing with candidate behaviours within campaign timeframes.

Further, while it is not in the legislation, in the Bill's introductory speech, the Deputy Premier indicated that during election campaigns, it is the government's intent that 'the conduct of a councillor wholly in their capacity as a candidate is personal conduct' and that all such complaints will be dismissed at assessment stage:

> *'In relation to the conduct of councillors running again for office, I acknowledge the concerns of the Local Government Association of Queensland that there should be a level playing field for all election candidates, whether sitting councillors or new candidates, during election campaigns.*
>
> *'The government's view is that the conduct of a councillor wholly in their capacity as a candidate is personal conduct. This determination means complaints will be dismissed at the assessment stage, as I have just outlined.*

'While some stakeholders have proposed a code of conduct for candidates, the government considers that the view of the electorate as expressed at the ballot box should be a sufficient deterrent for unacceptable conduct by all candidates. We trust Queenslanders to make good decisions when it comes to who represents them.'

It is noted that a system that requires the conduct of sitting councillors during an election campaign to be dismissed as personal conduct, but which could in theory, result in candidates being declared vexatious, banned for up to 4 years and their identities published, appears to be a system that is weighted heavily in favour of sitting councillors, whose conduct cannot be investigated and whose complaints cannot be deemed vexatious.

It is worth noting again the Deputy Premier's comment in the introducing speech '*that there should be a level playing field for all election candidates, whether sitting councillors or new candidates, during election campaigns."*

OIA recommendation

An offence that allowed the OIA to criminally prosecute members of the public and local government officials based on a course of complainant conduct would be substantially more effective in safeguarding the councillor complaints system from misuse and would be a far more efficient use of resources.

Alternatively, if vexatious declaration provisions are retained:
-they should also apply to local government officials, and
-the availability of a QCAT review should be restricted to the decision to declare a complainant as vexatious; consistent with the OIC legislative model.

5. Clarify the definition of what is misconduct

What the Bill says

The Bill amends the definition of misconduct in section 150L(1)(b)(i) to remove 'breach of trust placed in the councillor, either knowingly or recklessly' as a category of misconduct and to insert in its place 'non-compliance with an Act by a councillor'.

The Explanatory Notes state that this change has been made to:

'…make clear that the conduct does not relate to public sentiment regarding a councillor.'

It appears that this is in response to CCT decisions that have found councillors to have breached the trust placed in them by members of the community when their conduct has the potential to "undermine public confidence in the integrity of the person in their role as a councillor".

While it is understood that new section 150L(b)(i) is intended to cover more broadly non-compliance by a councillor with the LG Act, the City of Brisbane Act (CoBA) or another Act, it does not expressly say so and could be interpreted to be limited to non-compliance with an Act, other than the LG Act or CoBA.

There are two relevant principles of statutory interpretation that would mean that the new section 150L(1)(b)(i) could be read down as only referring to contraventions of Acts, other than the LG Act or CoBA.

Firstly, it is generally considered to be improbable that the framers of legislation could have intended to insert a provision which has virtually no practical effect.

Inserting 'non-compliance with an Act' in the new 150L(1)(b)(i), gives he limbs of misconduct in (150L(1)(c)(iv) and (v) which list contraventions of specific sections of the LG Act or CoBA, no practical effect, because any contraventions of those sections are already covered by the new 150L(1)(b)(i).

The only way to give sections 150L(1)(c)(iv) and (v) any practical effect would be to read the news section,150L(1)(b)(i), as referring to non-compliance with an Act, other than the LG Act or CoBA.

Secondly, an express mention of a matter in a statute can indicate that other related matters are excluded. Applying that to the current drafting of the Bill, it is noted that section 150L(1)(c)(iv) and (v) prescribe specific sections that, when contravened, amount to misconduct and that therefore it could be argued that it is intended to exclude contraventions of other sections of the LG Act or CoBA from amounting to misconduct under section 150L(1)(b)(i).

The result of either interpretation would be that a councillor whose conduct is, for example, inconsistent with the Local Government Principles, would not engage in misconduct.

This would mean that while section 4(1) requires that anyone who is performing a responsibility under the Act **must** do so in accordance with the local government principles; non-compliance with the local government principles would become entirely un-enforceable.

It is noted that when the Local Government Principles were introduced in 2009 the Explanatory Notes relevantly stated:

> *'This Bill provides a principles-based framework for decision making and governance… Anyone performing a responsibility under this Bill must consider the application of the Local Government Bill 2009 The principles apply to the processes carried out under the Bill as well as the results of those processes. Principles-based legislation allows practitioners to focus on outcomes and develop their own operational procedures and processes.*
>
> *It does not mean that the Bill will be less enforceable. Principles-based legislation achieves higher levels of compliance. By requiring entities to comply with the spirit rather than the letter of the law, they must come to terms with the reasons behind the law.*
>
> *Principles replace detailed prescription of roles and responsibilities and make a mandated separate code of conduct for councillors redundant. The principles highlight the absolute essentials of excellently performing local governments which citizens expect and deserve. The principles are at one and the same time, aspirational, inspirational, practical and demanding.'*

OIA recommendation

That section 150L(1)(b)(i) be amended to read, 'non-compliance with **this Act or another Act**, by a councillor.'

6. Legislated assessment process

Existing OIA assessment practice

Assessment is new to legislation, but not to OIA.

While existing section 150T states that the OIA **must** investigate the conduct of a councillor upon the receipt of a complaint, notice information or referral, the OIA has in practice had a robust preliminary assessment process in place since establishment on 3 December 2018.

Not only is preliminary assessment or triaging of complaints a feature of all complaints system and best practice complaints management – robust assessment has been necessary for the OIA to manage the volume of complaints received, and the limited resources available to deal with them.

The OIA has consistently aimed to have a preliminary assessment undertaken and outcome communicated within 21 working days.

For the 2022-23 financial year:

- 94 per cent of complaints or notifications were assessed and an outcome communicated within 21 working days; and
- 65 per cent of complaints or notifications were dismissed on assessment.

For most councillors the first they will know of a complaint, is an outcome advice advising them that the complaint has been received and dismissed.

This robust triage process allows the OIA to focus its resources on the 20 per cent of matters which are investigated as potential misconduct either because:

- the complaint, notice or information has raised a reasonable suspicion of misconduct,
- the matter is complex and further investigation is required to determine this, or
- and or the matter has been assessed by the CCC as suspected corrupt conduct and referred to the OIA to deal with.

After investigation and natural justice processes only five per cent of complaints, notices or information ultimately result in an application to the CCT.

A total of 137 applications have been made to the CCT in almost five years of the councillor conduct complaints system.

That is about 27 applications a year.

What the Bill says

The Bill introduces a new Chapter 5A Part 3 Division 3A Preliminary Assessments and includes –

- 150T – amended to remove the existing mandatory requirement that the OIA **must** investigate all complaints received. Amendment requested by the OIA and discussed in SDRIC report at Pages 47 and 74
- removal of duplicate 150AA process for lower level conduct breaches. Amendment requested by the OIA and supported by SDRIC recommendation 17
- removing the requirement for the OIA to provide outcome advices to a local government

and to record **dismissals and NFAs** in councillor conduct registers. Amendment requested by the OIA and supported by SDRIC recommendation 30

- new requirement that assessor may ask local government or a local government official to provide information necessary to undertake an assessment within 10 business days and a local government official or local government must comply with this request.

The OIA welcomes all of these changes, which will improve efficiencies and make better use of the OIA's resources:

New section 150SD of the Bill legislates a preliminary assessment process and largely reflects current OIA assessment practice with the following exceptions:

Section 150SD (2) mandates that the assessor **must** dismiss or take no further action on a complaint, notice of information made in relation to a councillor **where the assessor is satisfied**:

- The conduct alleged does not fall within new restrictive timeframes for the receipt of complaints unless the conduct is suspected corrupt conduct or exceptional circumstances apply as addressed in this submission at page 19
- The conduct alleged was engaged in by the councillor to comply honestly and without negligence to a guideline made by the department
- The conduct is solely personal conduct as addressed in this submission at page 5
- The office of councillor has been vacated unless the conduct is suspected corrupt conduct as addressed in this submission at page 16.

Issue 1: Increased exposure to judicial review

Making the assessment of complaints a legislated process and setting out prescriptive mandatory and discretionary matters that must or may be considered on assessment will mean that, on average, up to 1,000 OIA assessment decisions per year may become subject to judicial review.

This has potential to allow complainants and subject councillors to make application for judicial review of decisions to:

- dismiss or take no further action on a matter
- to refer a matter to local government for investigation, or
- to commence an investigation into a matter.

Judicial Review Act 1991 (Qld)

The Judicial Review Act sets out a framework for the Supreme Court review of particular administrative decision-making.

- Section 4 defines the nature of decisions to which the Act applies and relevantly includes '**decision** of an **administrative character** made, proposed to be made, or required to be made, **under an enactment**'.

At present decisions made on assessment by the OIA are not made under an enactment.

- Section 5 defines what it means to 'make; (or fail to make) a decision and which includes a decision maker 'doing or refusing to do anything else'.
- Section 7 defines 'person aggrieved', which includes a person 'whose interests are adversely affected by the decision'.
- Section 20 states that 'a person **who is aggrieved** by a **decision** to which this Act applies may apply to the court for a statutory order of review in relation to the decision'.
- Section 32 provides that a person who is aggrieved may request a statement of reasons for the decision (but note that section 31 applies **if** the decision is accompanied by a statement giving the reasons for the decision).

The OIA has not been able to identify any other complaints framework where the preliminary assessment or triaging decisions are required to be made under an enactment, according to mandatory or prescriptive statutory considerations.

Assessment decisions are not determinative of whether a councillor has engaged in councillor conduct or not; such determinative decisions are not made by the OIA; but by a local government (for conduct matters) and the CCT for misconduct matters.

As a consequence of the potential for judicial review however, the OIA will be required to increase the length and formality of outcome advices **and this will increase assessment timeframes.**

This may also expose the councillor complaints framework to further legalisation, may require the allocation of additional OIA legal and court resources.

Issue 2: Impact on assessment timeframes

A further implication of mandating assessment considerations is that it may be difficult, based on the information that would ordinarily be known on assessment, to determine whether conduct referred to in complaint, notice or information:

- falls or does not fall within new restrictive timeframes for the receipt of complaints, in whole or in part
- whether exceptional circumstances exist relating to why a matter was not reported within the new timeframes
- is it solely personal conduct, or not.

For the IA to satisfy themselves of these matters as the Act requires, including in a manner which may be defensible on judicial review, it is likely that some matters may need to held in assessment for longer periods, which will impact on existing assessment timeframes.

Relevant information may in fact not be able to be obtained on assessment.

Issue 3: Prejudice to the identification and investigation of misconduct that is properly within the new Bill

Mandatory dismissal or no further action (NFA) of the matters referred to in section 150SD(2)(b)(c)(ii) on preliminary assessment will prejudice the ability of the OIA to identify and deal with the conduct of serving councillors that is misconduct within the new Bill.

This is because the OIA's powers to investigate matters will not be available on assessment and it may not therefore be possible to identify whether or not the conduct is properly within the Bill on assessment, resulting in the mandatory dismissal of the matter.

Issue 4: Prejudice to the identification and referral of suspected corrupt conduct

Mandatory dismissal or NFA of the matters referred to in 150SD(2)(b)(i) will prejudice the ability of the OIA to identify and refer suspected corrupt conduct by current and former councillors.

These matters are amongst the most factually and legally complex.

By its very nature, corrupt conduct is difficult to detect and takes careful investigation to reveal the circumstances. This is not always obvious or possible on assessment.

In 2022-23, the OIA referred 20 suspected corrupt conduct matters to the CCC.

Only six of these matters identified as suspected corrupt conduct on assessment.

Fourteen corrupt conduct notifications arose out of decisions to investigate misconduct which resulted in the identification of suspected corrupt conduct, during the course of the investigation.

It is the OIA's experience that serious allegations of corrupt conduct, which would now fall within section 150SB and section 150SD(2)(b), have only been identified as a result of an OIA investigation.

Issue 5: How the corrupt conduct exception is framed

There is a significant issue in how the 'corrupt conduct' exception is referred to in multiple locations throughout the Bill, which is dealt with further at page 16.

OIA recommendation

The object of these provisions appears to be to reduce the circumstances in which current and former councillors can be investigated and dealt with for councillor conduct.

If this is the will of the government and the legislature, this can be mandated without prescribing an assessment process. See for example section 150CAB in the Bill.

Removing the consideration of such matters from the assessment process will also allow matters to be properly investigated and either referred to the CCC, dealt with as misconduct where the conduct properly falls within the Bill, or dismissed as the case may be.

7. Application of the Transitional Provisions

What the Bill says

Relevant to the OIA; the transitional provisions provide:

Section 346 Existing investigations by assessor

All matters with the OIA at the time of commencement of the new Bill are required to be re-assessed in accordance with new Chapter 5A part 3 Division 3A 'Preliminary Assessments' with the exception of the new time limitations on receipt and assessment of complaints.

Section 350 Particular CCT applications taken to be withdrawn

In relation to all applications before the CCT, which have not been decided immediately before commencement of the Bill, the assessor must withdraw applications if one or more of a number of prescribed circumstances apply. This is capturing where the:

- councillor was a former councillor when the application was made
- conduct relates solely to behaviour engaged in by the councillor in a personal capacity
- if the conduct is a contravention of the acceptable request guidelines of a local government
- particular conduct of a chair of a local government meeting
- the conduct relates to conflict of interest matters, taking into account amendments in the Bill to these provisions.

In order to test the application and clarity of section 350, in particular, the OIA have considered the application of this provision to all matters currently before the CCT which will not have been decided by commencement of this Bill.

The following issues have been identified.

Issue 1: Corrupt conduct exception is not applied to Sections 350 (1)(c) (i) and (ii) and 150AKA (2)

Sections 350 (1)(c) (i) and (ii) do not have the corrupt conduct exception that is contained in section 150CAB of the Bill.

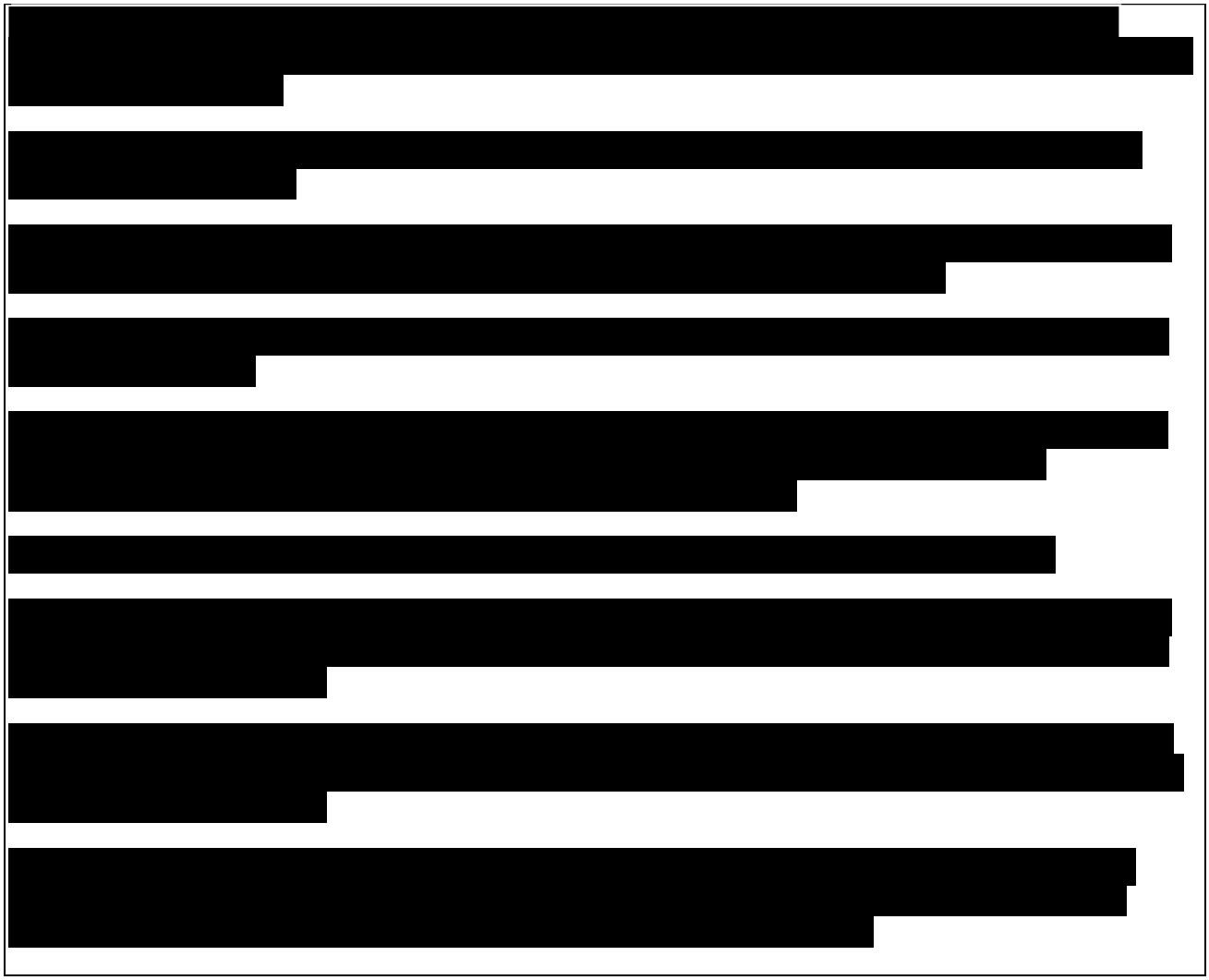
Therefore, as presently drafted, matters before the CCT where the underlying complaints, notices or information have been assessed by the CCC as suspected corrupt conduct and referred to the OIA to deal with in accordance with the provisions of the *Crime and Corruption Act 2001*, will be subject to mandatory withdrawal.

This will also apply to former councillors or current councillors whose offices are vacated after the 2024 local government elections.

The corrupt conduct exception is also not in section 150AKA (2) which imposes a continuing requirement of mandatory withdrawal of applications before the CCT, if the office of a councillor is vacated.

Under these sections suspected corrupt conduct by councillors, which are already before the CCT will not be dealt with.

[redacted]



Issue 2: What happens if a CCT application withdrawal is contested

The operation of section 350 is not clear cut, and no consideration has been given as to what will happen if a decision to withdraw, or not to withdraw, a matter from before the CCT, is contested.

For example, the assessor **must** according to section 350 (1)(c)(iii) withdraw matters currently before the CCT that relates to conduct engaged by a councillor solely in a personal capacity.

The definition of what is conduct engaged in by a councillor solely in a personal capacity is left to the IA to determine.

Councillors who are the subject of these applications might well take a different view to the assessor on what is solely personal conduct.

Issue 3: No pathway to deal with breaches of acceptable request guidelines that must be withdrawn from the CCT

There are no applications currently before the CCT that solely relate to an allegation of breach of the acceptable request guidelines.

There are two applications before the CCT involving multiple allegations where allegations include a breach of the acceptable request guidelines.

Under section 350 (2)(b) the assessor is required to withdraw that part of the application that relates to a breach of the acceptable request guidelines.

In the above circumstances it is suggested that these matters should be able to be dealt with under existing section 150AJ(1)(b).

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